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No. 06-241

IN THE

Supreme Court of the United States

ROYA RAHMANI, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITIONER

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INTRODUCTION

As elucidated by Judge Kozinski's dissent from the denial of en banc review, the Ninth Circuit has decided a critical First Amendment issue in direct conflict with longstanding Supreme Court precedent. The *amicus* briefs filed by The Constitution Project and Congressmen Bob Filner and Tom Tancredo highlight the importance of the threat to the First Amendment posed by the Ninth Circuit's extraordinary holding that the government can criminalize expressive activity without providing for heightened procedural protections, or even affording a criminal defendant the right to argue that his or her expression was constitutionally protected.

The Government's perfunctory treatment of those critical issues – suggesting technical reasons why certiorari could be denied, repeating previously discredited arguments, and offering ill-reasoned ways to distinguish applicable Supreme Court precedent – shows that the Government has no real justification for the Ninth Circuit's defiance of controlling Supreme Court authority.

ARGUMENT

1. The fact that the Ninth Circuit's opinion was issued on a motion to dismiss has no bearing on its cert-worthiness.

The brief in opposition urges this Court to reject certiorari on the ground that this case is in an interlocutory posture and, if Petitioner Roya Rahmani and her six co-defendants are all acquitted, the issues raised by the certiorari petition could be rendered moot. Br. in Opp. 12.

But it is well established that when, as here, a petition for certiorari presents an important issue that is "fundamental to the further conduct of the case," its interlocutory posture poses no barrier to this Court's consideration. *See United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945). Thus, this Court quite often grants certiorari to review cases

in the identical posture as this one – where a federal court of appeals has reversed a district court's dismissal of a civil or criminal complaint. *See, e.g., Bates v. United States*, 522 U.S. 23, 28-29 (1997); *Solorio v. United States*, 483 U.S. 435, 437-38 (1987); *Estelle v. Gamble*, 429 U.S. 97, 98 (1976); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n.3 (1949); *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947).

Those criteria are certainly met here. The Government does not dispute the importance of this case; nor could it. The decision below is a published Ninth Circuit opinion that will govern future prosecutions brought under 18 U.S.C. §2339B as well as other cases with important First Amendment implications, regardless of what happens to Petitioners on remand.

Review is critical so that the Ninth Circuit decision, which as Judge Kozinski warned, "runs contrary to two of our defining traditions – that of free and open expression, and that of justice and fair play," Pet. App. 3a, does not wreak havoc on constitutional liberties. *Compare Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 471 (1977) (reviewing lower court's denial of motion to dismiss because of importance of issue involved).[1] *Amici* point out that the decision will work chilling effects on legitimate political expression, particularly when organizations may be falsely designated terrorist for political reasons. *Amicus* Br., Congressmen Filner and Tancredo 6-7. And they highlight that the significance of the Ninth Circuit opinion goes beyond its implications under §2339B, for its logic would permit the government, by fiat, under the guise of fighting terrorism, to take actions including criminalizing published works deemed national security threats. *See Amicus* Br., The Const. Proj. 10, 15.

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[1] By contrast, in *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251 (1916), upon which the Solicitor General relies, the petitioner had previously argued that the case "involved no question of public interest and general importance . . . ." *Id.* at 258.

Further, the Ninth Circuit decision is fundamental to the further conduct of this case, and poses immediate consequences for the seven petitioners: They will be forced to undergo a criminal trial, facing penalties of up to ten years of imprisonment per count, deprived of perhaps their strongest defense. In such cases, certiorari is warranted even when the case is in an interlocutory posture. *See Mazurek v. Armstrong*, 520 U.S. 968, 975 (1997).

By contrast, no greater judicial efficiency will result from postponing review. Unless all seven Petitioners are acquitted of all charges (a prospect rendered somewhat unlikely by the Ninth Circuit's preclusion of perhaps their strongest defense, but which, in any event, would leave the Ninth Circuit's published opinion intact), future proceedings in this case will not in any way affect the review of the questions presented. Because the First Amendment defense is barred, no further factual development will take place. And the law of the case doctrine will prevent Petitioners from further argument on the legal issues. No further efficiency will derive from consolidating judicial consideration of this issue with that of other appellate issues raised after trial. *Compare Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152-53 (1964).

For these reasons, it makes no sense to postpone review and thereby to allow the Ninth Circuit decision to stand as binding precedent while Petitioners go through proceedings that will shed no additional light on the questions presented.

2. The Government inexplicably mischaracterizes the statute at issue in *McKinney* in a futile attempt to distinguish that case.

In what may be seen as an implicit concession that *McKinney* is otherwise not distinguishable, the brief in opposition asserts that the element of the offense at issue in *McKinney* was that the material "was in fact obscene," *not* whether it had been previously designated as obscene. Br. in

Opp. 16. That argument is blatantly false, as has previously been pointed out in this case.

In *McKinney*, the defendant was charged with "selling 'mailable matter known . . . to have been judicially found to be obscene.'" *McKinney v. Alabama*, 424 U.S. 669, 672-73 (1976) (ellipses in original). The Alabama statute did the same thing as Section 2339B—it prohibited the sale of material "judicially found" to be unprotected by the First Amendment (in that case, obscene; in this case, terrorist).[2]

The original Ninth Circuit opinion in this case, like the brief in opposition, erroneously stated that the element of the crime at issue in *McKinney* was that the material sold was in fact "obscene." *United States v. Afshari*, 392 F.3d 1031, 1039 (9th Cir. 2004), *opinion withdrawn and superseded*, 412 F.3d 1071, *on rehearing*, 426 F.3d 1150 (2005). The Petition for Rehearing pointed out that the panel was mistaken. The subsequent Ninth Circuit opinions did not rely on this false distinction; nor did the Government ever advance this clearly erroneous argument in the lower courts. Thus, the revival of this discredited argument as a purported distinction, despite the Government's knowledge that it is erroneous, suggests that all parties understand that *McKinney* is on all fours with this case.[3]

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[2] In *McKinney*, the designation had to be "judicial," while here the statutory predicate for a criminal prosecution is simply an administrative determination. *See* 8 U.S.C. § 1189(a)(1) (2000); 18 U.S.C. §2339B(a)(1) (2000).

[3] It is also worth noting that (then) Justice Rehnquist's reasoning in *McKinney* did not depend on the obscenity test's incorporation of local community standards. In fact, the prior determination at issue in *McKinney* had been made in Alabama, where the criminal prosecution was also brought. 424 U.S. at 671-73.

3. No authority provides that the executive branch's discretion over foreign policy overrides the First Amendment protections mandated by *McKinney* and *Freedman*.

In arguing that courts must defer to the executive's foreign policy determinations, the brief in opposition relies on cases involving substantive due process challenges to travel restrictions, Br. in Opp. 13-14, even though those decisions make it clear that no First Amendment right was implicated and that the analysis would otherwise have been different. *See Regan v. Wald*, 468 U.S. 222, 241-42 (1984); *see also Zemel v. Rusk*, 381 U.S. 1, 16 (1965). In fact, those Supreme Court decisions highlight that, when First Amendment rights are implicated by a travel restriction, this Court does not blindly defer to the Government's claim that a restriction is necessary for national security. *See Aptheker v. Secretary of State*, 378 U.S. 500, 509, 514 (1964).[4]

The Government asserts that the material support law at issue in this case is more like the categorical travel ban upheld in *Regan* than the travel restriction based on political affiliation struck down in *Aptheker*. Br. in Opp. 13-14. But the reason that it mattered in those cases whether the travel restriction was categorical or viewpoint-based is because there is no First Amendment right to travel. Only if the travel restriction is based on political affiliation is the First Amendment implicated. *See Regan*, 468 U.S. at 241-42; *Zemel*, 381 U.S. at 16-17. Here, by contrast, there *is* a First Amendment right to contribute to political groups, which is violated by a conviction for contributing to a political

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[4] This Court has more recently had occasion, in cases including *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004), and *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006), to reaffirm that claims of national security do not shield the Government's decisions from scrutiny when individual liberties are at stake.

organization erroneously designated as terrorist regardless of the reason for that designation.

As *amici* explain, the Ninth Circuit's holding that a person may be criminally prosecuted without the opportunity to show his activity was constitutionally protected is unprecedented, particularly in the First Amendment context, and allowing it to stand would contravene this country's traditions and undermine the rule of law. *Amicus* Br., Const. Proj. 11-13 & n.3.[5]

4. Core First Amendment activity is at issue here.

Notably, the Government does not defend the Ninth Circuit's circular and conclusory reasoning that there is no First Amendment right to contribute to a terrorist organization (just as, of course, there is no right to publish material that is

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[5] The brief in opposition's reliance on a lower court case, *United States v. Borazov*, 974 F.2d 1037, 1044 (9th Cir. 1992), is misplaced. *Borazov* involved no First Amendment issue, and its rejection of a nondelegation challenge to the Secretary of Commerce's export authority was premised on its conclusion that courts *do* have the authority to review colorable constitutional challenges to the Secretary's actions. 974 F.2d at 1038, 1044-45.

Nor does *Borazov* evidence an "interest in nationwide uniformity of the sort implicated by this case." Br. in Opp. 16. *Borazov* involved the prospect of contrary legal rulings by federal courts of appeals. In this case, by contrast, a jury acquittal would render no legal ruling and have no preclusive effect whatsoever. *See* Cert. Petn. 20-21. As *amici* point out, similar jury determinations are made in espionage and other prosecutions as a matter of course. *Amicus* Br., Const. Proj. 10, 16.

Moreover, the Government's purported interest in nationwide uniformity is belied by the statute's failure to prohibit defendants in civil injunction cases from challenging an organization's designation, *see* 18 U.S.C. §2339B(c) (2001); 8 U.S.C. §1189(a)(8) (2001), so that inconsistent determinations regarding the same organization are already possible. And if Congress is concerned about uniformity, it might amend the statute to designate a single venue for defendants in civil and criminal cases to assert their challenges.

actually obscene) or its misguided conclusion that monetary contributions are not constitutionally protected expressive activity. *See* Cert. Petn., App. 5a-6a, 31a-32a. However, the brief in opposition challenges the applicability of *McKinney* and *Freedman* on the ground that contributions to "foreign" organizations enjoy lesser constitutional protection than the "core" First Amendment activity of publishing potentially obscene material. *See* Br. in Opp. 15, 17.

But the determination that an organization is "foreign" says nothing about whether it engages in expressive activities in the United States (as, in fact, the PMOI does). More important, Petitioners have previously explained that contributions to foreign groups enjoy no less constitutional protection than those made to wholly domestic causes. Cert. Petn. 18-19. The Government cites no contrary authority.

The importance of the expressive activity at issue is well illustrated by the strong interest of Members of Congress in the right of individuals to contribute to the organization deemed terrorist in this case, as revealed both by Members' filing of an *amicus* brief, and by the signatures of hundreds of Members on letters asking that the designation be lifted. *See Amicus* Br., Congressmen Filner and Tancredo 9-11 & n.8, 12-13 & n.9, 16. It would be strange indeed if contributions to organizations that have attracted such congressional interest – or for that matter to groups like the African National Congress or partisans opposing the Nazis – were held to enjoy lesser constitutional status than sexually explicit material that is not quite obscene. The Government's argument turns on its head the actual order of constitutional magnitude of the expression at issue in *McKinney* and that at issue here. For "it is manifest that society's interest in protecting [sexually explicit] expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate . . . ." *Young v. American Mini Theaters*, 427 U.S. 50, 70 (1976) (Stevens, J., plurality opinion).

5. The Government confuses the heightened procedural protections required by *Freedman* before a prior restraint upon expression can be imposed with the minimal procedures mandated by the Due Process Clause.

The brief in opposition contends that the issues in this case are unlikely to arise again because the D.C. Circuit fixed any due process problems with the terrorist designation procedures. Br. in Opp. 20. But that argument is a red herring because Petitioners' *Freedman* argument does not depend on the D.C. Circuit's determination that the procedures used to designate the PMOI as terrorist in 1999 violated the Due Process Clause.

Freedman v. Maryland, 380 U.S. 51 (1965), is not a procedural due process case; it is a First Amendment case. In *Freedman*, this Court established that when the Government seeks to impose a prior restraint on potentially protected speech it must provide "adequate safeguards against undue inhibition of protected expression." 380 U.S. at 59. Those safeguards include requirements that the designation proceedings be adversarial, provide for effective and prompt judicial review, place the burden upon the Government to prove that the activity is unprotected, and permit the expression until judicial review has been completed. *Id.* at 58-59.

The minimal procedural protections that have been implemented in response to the D.C. Circuit's holding in cases involving organizations physically present in the United States (that is, notice of the proposed designation and the unclassified supporting items, and the opportunity to respond in written form, *see National Council of Resistance of Iran v. Department of State*, 251 F.3d 192, 196, 208-09 (D.C. Cir. 2001) ("*PMOI II*")), do not come close to fulfilling *Freedman*'s requirements.[6] Judge Kozinski's opinion identifies

[6] In the cases decided by the D.C. Circuit, the PMOI did not argue that the designation process imposed a prior restraint or that the First Amend-

numerous aspects of the terrorist designation procedure that violate *Freedman*'s mandate: The prohibition on monetary contributions takes effect immediately upon the Secretary's designation and remains in force while judicial review is pending. The burdens of proof and of instituting judicial review fall upon the organization. There is no assurance of prompt judicial determination. And the only "judicial review" available is cursory and far from the meaningful adversary proceedings that *Freedman* demands. Cert. Petn., App. 7a-9a & n.4.

Moreover, the Government acknowledges that even the limited *PMOI II* procedures are provided only when an organization has a constitutionally significant presence in the United States. Br. in Opp. 20. But a citizen's First Amendment right to contribute to a non-terrorist political organization is not derivative of the organization's constitutional rights. Nor does it depend on the organization's physical presence.[7]

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ment required heightened procedural protections. So the court had no occasion to address such an argument. Moreover, the D.C. Circuit cases did not involve a criminal prosecution. Thus, there was no consideration of whether a criminal defendant would be entitled personally to challenge the designation or to any other heightened protections.

[7] For this reason, the argument that *Freedman* has no applicability to conduct that took place when the 1997 designation was in effect (because the D.C. Circuit found that the MEK did not have a physical presence in the United States) is misguided. Br. in Opp. 19. The procedures used to make the 1997 designation provided no more procedural protections than those used in 1999, which were held to violate even the minimal requirements of the Due Process Clause. *See* Cert. Petn., App. 9a-10a n.5. (And contrary to the Government's suggestion, the designation entered in 1999 was never upheld by the D.C. Circuit; rather, the court upheld a retroactive designation entered on September 24, 2001, well *after* the acts charged in the indictment. *See People's Mojahedin Org. of Iran v. Department of State*, 327 F.3d 1238, 1241 (D.C. Cir. 2003) ("*PMOI III*")).

If the Government is right about *McKinney*, then a criminal defendant has no right to defend himself on the ground that his donations were actually made to a non-terrorist organization and were therefore constitutionally protected. In that case, the *only* First Amendment protection provided to a person who wishes to engage in the expressive activity of making political donations would be those safeguards provided in the designation procedure itself. And the Government's rejection of the protections required by both *McKinney* and *Freedman* mean that expressive activity could be subjected to prior restraint and subsequent criminal prosecution with only minimal procedural safeguards or none at all.

The threat posed, as Judge Kozinski notes, by authorizing the executive branch "carte blanche to label any organization it chooses a foreign terrorist organization and make a criminal out of anyone who donates money to it," Cert. Petn., App. 14a, is even more dramatic than that posed by the institutional bias of a censor whose "business is to censor," *Freedman*, 380 U.S. at 57. *Amici* call attention to the ever-present danger that the State Department will designate an organization as terrorist based on political considerations, either foreign or domestic, as substantial evidence suggests was done here. *Amicus* Br., Const. Proj. 18; *Amicus* Br., Congressmen Filner and Tancredo 7, 9-14. Thus, this case well illustrates why the First Amendment demands additional procedural protections beyond those mandated by the Due Process Clause.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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